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ADMIRALTY JURISDICTION AND STATE WATERS.

THE case of *Ex parte Boyer*¹ closes with the statement that it "does not raise the question whether the admiralty jurisdiction of the district court extends to waters wholly within the body of a state, and from which vessels cannot so pass as to carry on commerce between places in such state and places in another state or in a foreign country; and no opinion is intended to be intimated as to jurisdiction in such a case." Nor does any other case appear directly to intimate such an opinion, unless it be that of *Stapp v. Clyde*² wherein a state court decided that a federal statute giving to district courts jurisdiction over "the navigable waters of the United States" did not apply to navigable waters of the state wholly unconnected navigably with those of other states, there being a distinction between waters of a state and those of the United States. This holding was declared without discussion or reasons given and appears not since to have been elucidated. It is thus left an open question whether or not the potential admiralty jurisdiction of the Federal courts extends to such state waters.

It does not reach them by virtue merely of the fact that they are waters; it covers only navigable waters. "All admiralty jurisdiction refers directly or indirectly to navigation. It is the vessel and its navigation, and the crimes, torts, and contracts growing out of it, that form the objects of admiralty jurisdiction."³ Indeed, prior to 1851, the jurisdiction recognized by the courts extended only to waters within the ebb and flow of the tide.

In England the jurisdiction had been restricted by the common law courts to the high seas only, to that portion of the sea which washes the open coast, exempting those waters which were "*infra corpus comitatus*." As said in the case of *Rex v. 49 Casks of Brandy*,⁴ quoting WOOD'S INSTITUTE, "The admiralty court has jurisdiction to determine all maritime causes arising wholly upon the sea out of the jurisdiction of the county. * * * It is no part of the sea where one may see what is done on one side of the water and on the other."

The contention was made in this country that the admiralty jurisdiction of United States courts also was restricted to the high seas and did not extend to our bays, inlets and river mouths, "within

¹ 109 U. S. 629, 632 (1883).

² 43 Minn. 192 (1890).

³ U. S. v. Burlington & Henderson Ferry Co., 21 Fed. 331, 334 (1884).

⁴ 3 Hagg. 283 (1836).

the *fauces terrae*, even though they be tide-waters, on the ground that the grant in the Constitution of 'all cases of admiralty and maritime jurisdiction' " was limited to the cases which were of such jurisdiction in England at the time the Constitution was adopted. This claim was considered, on the question as to whether a maritime contract made on land is within admiralty jurisdiction, in the case of *DeLorrio v. Boit*⁵ in a very lengthy opinion by Justice STORY. He held, p. 467:

"1. That the jurisdiction of the admiralty (in England) until the statutes of Richard II, extended to all maritime contracts, whether executed at home or abroad, and to all torts, injuries and offenses on the high seas, and in ports and havens as far as the ebb and flow of the tides.

2. That the common law interpretation of these statutes abridges this jurisdiction to things wholly and exclusively done upon the sea.

3. That this interpretation is indefensible on principle, and the decisions founded on it are inconsistent and contradictory.

4. That the interpretation of the same statutes by the admiralty does not abridge any of its ancient jurisdiction, but leaves to it cognizance of all maritime contracts, and all torts, injuries and offenses, upon the high seas, and in ports as far as the tide ebbs and flows.

5. That this is the true limit, which upon principle would seem to belong to the admiralty * * *."

This extent of jurisdiction in the United States was again declared in the case of *Waring v. Clarke*.⁶ Here the collision out of which suit arose occurred on the Mississippi about 95 miles above New Orleans, so far from the sea that it was a disputed question whether or not it was within the effect of tidal ebb and flow. The court said, p. 451,

"It is the first time that the point has been distinctly presented to this court, whether a case of collision in our rivers, where the tide ebbs and flows, is within the admiralty jurisdiction of the courts of the United States, if the locality be, in the sense in which it is used by the common law judges in England, *infra corpus comitatus*. It is this point that we are now about to decide * * *. Having thus admitted to the

⁵ 2 Gallison, 398, Fed. Cas. 3776 (1815).

⁶ 5 How. 441 (1847).

fullest extent, the locality in England within which the courts of common law permitted the admiralty to exercise jurisdiction in cases of collision, we return to the ground taken that the same limitation is to be imposed, in like cases, upon the admiralty courts of the United States. In the first place, those who framed the Constitution, and the lawyers in America in that day, were familiar with a different and more extensive jurisdiction in most of the states, when they were colonies, than was allowed in England * * *." p. 463, "Our conclusion is, that the admiralty jurisdiction of the courts of the United States extends to tide waters, as far as the tide flows, though it may be *infra corpus comitatus*; that the case before us did happen where the tide ebbed and flowed *infra corpus comitatus*, and that the court has jurisdiction to decree upon the claim of the libellant for damages."

Thus the jurisdiction in the United States was referred back of that known in England, and extended to all tide waters, but it was, by the implication in the very cases so extending it, restricted, also, to tide waters. This limitation and restriction was *expressly* stated in the case of the *Thos. Jefferson*,⁷ wherein the court say:

"In respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise, any jurisdiction, except in cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide. This is the prescribed limit which it was not at liberty to transcend."

It was followed by the opinion in the *Steamboat Orleans v. Phoebebus*,⁸ to the effect that

"the case is not one of a steamboat engaged in maritime trade or navigation. Though, in her voyages, she may have touched, at one terminus of them, in tide waters, her employment has been, substantially, on other waters. The admiralty has not any jurisdiction over vessels employed in such voyages, in cases of disputes between part owners. The true test of its jurisdiction in all cases of this sort is, whether the vessel be engaged, substantially, in maritime navigation, or in interior navigation and trade, not on tide-waters. In the latter case there is no jurisdiction."

⁷ 10 Wheat. 428 (1825).

⁸ 11 Pet. 175 (1837).

These decisions, of course, left all of our inland waters, lakes and rivers above tide-water, whether interstate or not, outside the admiralty jurisdiction. So matters stood until the decision in the case of the *Genesee Chief*,⁹ in 1851. This arose out of a collision between the propeller *Genesee Chief* and the schooner *Cuba*, on Lake Ontario. The defendants averred in answer "that the collision set forth in the said libel occurred within the territorial boundaries of the said state (New York), and not on the high seas, nor in any arm of the sea, river, creek, stream or any other body of water where the tide ebbs and flows, and therefore they say that this (admiralty) court has no jurisdiction over the matters set forth in the said libel * * *."

The court now completely overruled the earlier cases and held the matter to be within admiralty jurisdiction. They said, p. 451,

"the conviction that this definition of admiralty powers was narrower than the Constitution contemplated, has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the western states. * * * If the meaning of these terms (admiralty and maritime) was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different states border on them on one side and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; *and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes.* (Italics the writer's.) There is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it (them) unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same."

It has since been held to extend over all navigable waters that are interstate, either in themselves or in their connections—even to artificial waterways.

⁹ 12 How. 443 (1851).

This recognition of the extended jurisdiction was based not upon precedent, but upon the ground that there having been, until our own fresh-water commerce grew into importance, no navigable water except the high seas, there *could be no precedent* in regard to other waters, and that the reasons for which the United States courts were given admiralty jurisdiction, as then known, applied as pertinently to fresh water as to salt. It was not expressly extended to any waters except those "on which commerce is carried on between different states or nations," so that if it does extend to other waters it must be on the same theory—that the reasons for giving any distinct jurisdiction to admiralty apply to such waters as well as to the "high seas." The case itself does not discuss these reasons, so equally applicable. What they are must be sought elsewhere.

The title of "Admiral" originated, apparently, in the East, was adopted by the Mediterranean navies and came thence to England about the beginning of the 14th century.¹⁰ Even prior thereto, however, there had been courts in certain of the English sea-port towns which particularly administered the maritime law to merchants and sailors. "The origin of the Admiralty court can be traced with tolerable certainty to the period between the years 1340 and 1357. It was instituted in consequence of the difficulty which had been experienced in dealing with piracy or 'spoil' claims made by and against foreign sovereigns. The diplomatic correspondence of the half-century which preceded the battle of Sluys (1340) is distinguished by a constant stream of complaints made * * * by foreign sovereigns against England, as to piracies and spoils committed at sea; and as to the inability of the aggrieved persons to obtain justice. The process of our common law courts when resorted to by foreigners appears to have entirely failed to give redress. * * * Then (after the battle of Sluys) it was that the Admiral's court first took something of the shape in which we find it existing at the close of the century. Its origin was intimately connected with the claim made by Edward III and his progenitors to be sovereigns of the sea. * * * Its principal function was to keep the king's peace upon the sea."¹¹

Because of its jurisdiction over the seas, whereof England claimed sovereignty, other matters than piracy came within Admiralty's purview. The law merchant was, in England, so closely related to the common-law as to be practically a part of it, but it was "other-

¹⁰ Holdsworth's Hist. of English Law I, 313.

¹¹ Selden Soc. Select Pleas of the Admiralty, I, xiv. Vide also, E. P. Roscoe, Growth of Eng. Law.

wise with those rules of the law merchant which applied to *foreign* transactions, and with the rules of maritime law which * * * were intimately related to this branch of the law merchant. These branches of the law fell outside the scope of the common-law. Just as the borough court could not entertain cases which concerned persons or matters outside the scope of its territorial jurisdiction, so the courts of common law, after a little hesitation, declined to deal with events which had happened or transactions which had been entered into abroad. Such matters * * * fell to the council of the court of Admiralty."¹² The Admiralty had power of issuing commissions to examine witnesses abroad and it could arrest and detain a ship as security in an action, and by its jurisdiction over the ship itself could effectively handle suits, one party to which was in some foreign nation beyond reach of the ordinary courts. The enforcement of international law and rights of foreigners were, until the last century, regarded as outside the purview of the ordinary courts but rather within that of the admiral, chancellor or special officers, and more especially, as a branch of the maritime law, under the jurisdiction of the Admiralty.¹³

In short, the common law ceded to Admiralty a separate and special jurisdiction over maritime affairs, not because of any inherent jurisdictional distinction between land and water, or any essential difference in the transactions occurring on one or the other, but solely because the *international or extra-territorial character of the sea* necessitated procedure and methods which the ordinary courts did not possess. If, then, the origin and extent of separate maritime jurisdiction arose out of the international commonage of the seas, and not from a difference in natural laws applicable, it is illogical to suppose that its grant to the Federal government was intended to cover navigable water merely as such. The expression "admiralty and maritime jurisdiction" had no such meaning and the grant conveyed only its then understood application, with reasonable and logical extension.

Our own courts, in referring to the origin of admiralty courts or reasons for their existence, have spoken in such tenor only. Thus Justice WOODBURY, dissenting, in *Waring v. Clarke*,¹⁴ says,

"This last circumstance furnished another reason why the admiralty court was allowed there, and should be here, to continue to exercise some jurisdiction, beside their military

¹² Holdsworth's *Hist. of English Law*, II, 260.

¹³ *Id.*, 393.

¹⁴ 5 How. 441, 471 (1847).

and naval power, over the conduct of seamen and the business of navigation when foreign. Because such matters were connected with the ocean, with foreign intercourse, foreign laws and foreign people, and it was desirable to have the law as to them uniform, and administered by those possessing some practical acquaintance with such subjects; they being, in short, matters extra-territorial, international, and peculiar in some degree to the great highway of nations. It is when thus confined to the great highway and its concerns, that admiralty law deserves the just tribute sometimes paid to it of expansive wisdom and elevated equity. Then only there is an excellence in such regulations as to navigation over those for rights and duties on land; the last being often more for a single people, and their limited territory, while the former are on most matters more expanded, more liberal; the gathered wisdom of and for all maritime ages and nations." * * * "The sea being common to all nations, its police and the rights and duties on it should be governed mainly by one code, known to all, and worthy to be respected and enforced by all."

In *Chisholm v. Georgia*¹⁵ the court says, in reference to the general judicial power of the United States as established by the Constitution, that it extends, "5th, to all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privilege relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction." In *Jackson v. Steamboat Magnolia*,¹⁶ Justice McLEAN says, "The admiralty and maritime jurisdiction is essentially a commercial power, and it is necessarily limited to the exercise of that power by Congress. Every voyage of a vessel between two or more states is subject to the admiralty jurisdiction, and not to any state regulation." Again, "A Court of Admiralty is a court of the law of nations." * * * "The grant to the judicial department of the cognizance of all causes of maritime jurisdiction, makes the judicial co-extensive with the legislative power. This is the only way in which we could be assured of having, what is so important to a commercial nation, a uniform maritime law, in all the states of the Union."¹⁷

Congress has never attempted to extend the jurisdiction to any-

¹⁵ 2 Dall. 419, 474 (1793).

¹⁶ 20 How. 296, 304 (1857).

¹⁷ The Huntress, 2 Ware 89, 106, 108; Fed. Cas. 6914 (1840).

thing except interstate waters, having legislated only as to "navigable waters of the United States." Only those waters "constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes by which such commerce is conducted by water."¹⁸

To such waters, considering the states as separate judicial powers, all the reasons which created and enlarged the admiralty jurisdiction do apply as fitly as they originally did to the tidal waters. But when the waters are such that every transaction upon them must be begun and ended within the jurisdiction of a single judicial power, and the instruments of commerce upon them must at all times remain within the bounds of that power, those reasons do not apply, however appropriate the substantive law of the admiralty, separated from the jurisdiction, might be, and the same courts that administer the law of commerce and transactions upon the land can, and alone ought to, have jurisdiction of the water.

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¹⁸ *The Daniel Ball*, 10 Wall. 557, 563 (1870); *U. S. v. Burlington, etc. Ferry Co.*, 21 Fed. 331 (1884).